

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF COMMERCE, et al.,

Defendants.

18-CV-2921 (JMF)

NEW YORK IMMIGRATION
COALITION, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF COMMERCE, et al.,

Defendants.

18-CV-5025 (JMF)
(Consolidated)

**NYIC PLAINTIFFS' REPLY BRIEF IN
SUPPORT OF MOTION FOR SANCTIONS**

Cutting through the hedges, caveats, and non-denial denials, Defendants’ response confirms Defendants engaged in extensive misconduct to hide the pretextual nature of the VRA rationale and the true reasons they sought to add the citizenship question. The declarations and brief are a studied exercise in admission by omission, crafted to avoid addressing critical points. Ex. 1. Indeed, of the 26 questions posed at pages 25-27 of the opening brief, Defendants address only 9, and those are only partial responses. Ex. 2. Defendants instead leave a patchwork of unrebutted facts and open questions. They do not deny that Hofeller came up with the pretextual VRA rationale or that he did so at the request of *someone* at (or working at direction of) Commerce. But Defendants are silent about who engaged Hofeller, or how Hofeller’s VRA language came into Neuman and then Gore’s possession. Nor do Defendants say whether they understood (or intended) that the citizenship question would enable redistricting advantageous to “Republicans and Non-Hispanic Whites.” Defendants’ excuses for their obfuscation, including concealing Neuman’s and Hofeller’s involvement, are unsatisfactory.

The Court has at its disposal mechanisms to uncover the extent of Defendants’ wrongdoing—including authorizing Plaintiffs to obtain materials from third parties (such as Neuman), and compelling both testimony and production of withheld materials that would permit actual verification of Defendants’ denials. The Court should sanction Defendants and permit targeted discovery to confirm the extent of misconduct and the persons responsible.

I. DEFENDANTS FAIL TO REFUTE EVIDENCE OF THEIR MISCONDUCT

1. Defendants Fail to Answer Why or How Gore Obtained Hofeller’s Language

Defendants do not and cannot dispute that at their depositions, neither Neuman nor Gore admitted that Neuman provided the Neuman draft to Gore. Nor do they dispute that Neuman testified Hofeller was the “first person” to suggest adding a citizenship question, or that when he

was questioned about the Neuman draft, Neuman testified he worked on draft “versions” and that Commerce officials reviewed draft “versions.” ECF 635-2, Ex. 12 at 51, 278-84. Defendants characterize his testimony as “uncertain,” Opp. 18, but also argue there is “no evidence that Neuman provided false testimony,” Opp. 21. Defendants’ summary of Neuman’s testimony elides key passages, including that “others at the Department of Commerce were reviewing and offering thoughts on draft versions of this letter,” that when asked to identify participants he said “there are a lot of cooks in the kitchen” and that although he was “blurring” some people he specifically named Davidson, Comstock, and Uthmeier. ECF 635-2, Ex. 12 at 283-84.

Defendants’ declarations fail to address this and other significant issues. Exs. 1&2. For example, while Davidson, Comstock, and Uthmeier all deny having “received” or “seen” the Neuman letter “prior to the litigation” (Davidson ¶6, Uthmeier ¶6, Comstock ¶3), only Davidson avers that he was contemporaneously unaware of the Neuman letter. Davidson ¶5. Similarly, while all three deny having “met, communicated with, or spoken to” Hofeller (Comstock ¶2, Davidson ¶2, Uthmeier ¶11), none address whether they knew that someone else was requesting that Hofeller help develop the VRA rationale. Davidson and Uthmeier do not deny that they arranged the meeting between Neuman and Gore, at which Neuman provided Gore with the Hofeller-concocted VRA rationale. Nor do Davidson, Uthmeier, or Comstock contest that they understood adding a citizenship question would enable redistricting advantageous to “Republicans and Non-Hispanic Whites.” And Uthmeier does not explain what he meant when he wrote “our hook” is “[u]ltimately, we do not make decisions on how the [citizenship] data should be used for apportionment . . .” PX-607.

Tellingly, Defendants have not provided a declaration from Neuman—their “trusted advisor,” “analogous[] to an agency employee” (ECF No. 451 at 3)—who presumably could

address these issues. While Uthmeier's declaration says that Neuman testified incorrectly that Comstock, Davidson, or Uthmeier reviewed "versions" of the letter (Uthmeier ¶9) neither Defendants nor Uthmeier explain why Uthmeier (who attended the deposition as counsel for Commerce) failed to correct the record contemporaneously. And Uthmeier's declaration is silent on why he failed to correct other demonstrably false testimony, including that Neuman's meeting with Gore was *not* about a draft DOJ letter requesting a citizenship question on the 2020 Census, that Neuman gave Gore only a *different* document (not the Neuman letter) at that meeting, that Neuman was not involved in the drafting process for the DOJ letter at all, etc.

Several other related points bear emphasis. First, all of this occurred against the backdrop of Defendants adamantly opposing the Rule 45 testimony and document subpoena to Neuman, denying that "Neuman provided any particularly significant consultations on the citizenship question." ECF 346 at 2. Defendants contend that statement is taken out of context and that they "provided a full account of Neuman's role" and "accurately characterized the record evidence." Opp. 27. But the September 21, 2018 letter they cite (ECF 346) failed to note (i) Neuman met with Gore at Davidson and Uthmeier's behest, (ii) Neuman provided the Neuman letter to Gore, (iii) Neuman worked on draft versions of the letter with senior Commerce personnel, including Davidson, Uthmeier, and Comstock, and (iv) the Neuman letter contained the VRA rationale for adding a citizenship question (drafted by Hofeller).

Second, Defendants dispute the Neuman letter is a "draft" of the DOJ Request Letter, contending "no reasonable reader could conclude that the Neuman letter is a 'first draft' of the Gary Letter." Opp. 5. But when Neuman was presented with the letter at his deposition, he confirmed it appeared to be a "draft" of the DOJ request letter. ECF 635-2, Ex. 12 at 279-80. And when Gore was questioned by congressional investigators, he admitted that the letter he

received from Neuman was a “draft letter that would request reinstatement of the citizenship question” ECF 635-2, Ex. 13, Tr. 26. Moreover, Defendants give no explanation for the overlap between the substantive content of the two letters related to sophisticated and nuanced issues, most notably the purported need for block-level citizenship data to enforce the VRA. In addition to having similar discussion of Census history and the VRA rationale, both the Neuman draft and the DOJ Request letter contain virtually identical closing language.¹

Third, Defendants state they are not in a position “to assess the completeness of Neuman’s response to Plaintiffs’ subpoena” (Opp. 25), but they do not dispute Neuman failed to produce his correspondence with Hofeller or Commerce personnel. And their attempt to deflect blame to Neuman and his private counsel falls short considering their admission that they interceded in his document production. Opp. 26. Defendants do not address why they cannot produce their complete correspondence with Neuman or his counsel; there is no privilege that would shield such communications. Defendants also provide no reason why the Court should not order Neuman to comply fully and completely with the subpoena issued to him.

Fourth, Defendants failed to timely produce the Neuman letter from Gore’s files. Defendants’ response—that there was a temporary stay that extended the fact discovery cutoff, Opp. 4, 6—does not explain why (i) when served with a subpoena on July 20, they delayed identifying the Neuman letter on a log until October 3, (ii) they withheld the document at all, or (iii) they did not immediately produce the document when Plaintiffs challenged the designation on October 5. As for their belated production, Defendants do not explain why they relabeled the document, and they falsely represent that “for the sake of clarity” (Opp. 6) the document

¹ Compare ECF 635-1 Ex. 1 (“Please let me know if you have any questions about this letter or wish to discuss this request . . . Sincerely yours”) with Ex. 9 (“Please let me know if you have any questions about his letter or wish to discuss this subject . . . Sincerely yours”).

continued to bear the Bates number 15199 when there is nothing in the cover email or file title reflecting that Bates number.

As for their justification of the representation that “no metadata exists for author, recipient, date, or time” (Opp. 8) this is a classic illustration that a statement “may be completely misleading although every sentence separately considered is literally true.” *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 675 (2d Cir. 1963) (citation omitted). More troubling, Defendants provide an unsatisfactory explanation for why Gore failed to prevent the misrepresentation. They cite no authority for their assertion that Gore cannot “be held responsible for what is or is not stated on DOJ’s privilege log.” Opp. 7-8. Beyond being a witness, he is (or was) a senior official at the DOJ. And Gore’s explanation—that he did not “realize[] that the document in my possession must have come from Mr. Neuman” until “after Mr. Neuman produced the Neuman Letter” (Gore ¶17)—is contrary to Defendants’ previous assertion that anyone who did not know that “Gore had the Neuman letter” suffered from “obliviousness.” ECF 601 at 3. Nor does it explain why Gore failed to correct the misrepresentation when he purportedly remembered the provenance of the Neuman letter.

Finally, neither Davidson nor Uthmeier contest Gore’s statement to congressional investigators that he had a “dozen” interactions with them about the DOJ request letter, at least one of which concerned apportionment. ECF 635-2, Ex. 13 at 21. Yet, during his deposition, Gore did not identify Uthmeier (or Neuman or Hofeller) as having provided “input” into his letter, and as Defendants emphasize (Opp. 8), he testified that he had a conversation with Davidson (ECF 648-1, Ex. 5 at 137), not the “dozen” he told congressional investigators. As noted in Plaintiffs’ opening brief, almost none of these communications are reflected in the Administrative Record. According to both Davidson and Uthmeier, there are no “notes” or

“written communications” reflecting these discussions. Davidson ¶10, Uthmeier ¶12. The effort to avoid a paper trail is troubling, as they closely followed Secretary Ross’s directive—when advised by Comstock to be mindful of the Administrative Record in light of judicial review—that “we should be very careful, about everything. . . .” AR 12476. All of this suggests a purposeful effort to frustrate judicial review. *Cf. D.C. Federation of Civic Ass’n v. Volpe*, 459 F.2d 1231, 1237 (D.C. Cir. 1972) (the “non-existence of any contemporaneous administrative record is [] serious.”). Davidson, Uthmeier, and Comstock should all give a full accounting of their misconduct.

2. Defendants Fail to Confirm Completeness of the Administrative Record

Plaintiffs’ opening brief cited evidence that Comstock, Uthmeier, Davidson, and Jones failed to provide all of their materials in the Administrative Record or in response to discovery requests. ECF 635 at 11-16. While Uthmeier has averred that he “followed all policies and regulations regarding use of email to conduct official business” and did not “withhold, direct anyone to withhold, or become aware that anyone had withheld documents or information required in discovery, or for purposes of the administrative record” (Uthmeier ¶¶3, 14), the other three do not provide such assurances. Davidson limits his representation to “documents or information required to be produced in discovery” but fails to aver to the Administrative Record. Davidson ¶11. And there is no assurance in Comstock or Jones’ declarations at all. *See* Ex. 3.

The lack of assurance is troubling. As discussed above, Comstock initiated a discussion about the importance of curating the Administrative Record, and Davidson appears to have purposefully avoided creating a paper trail. Jones’s declaration confirms that she continued to communicate with Hofeller after January 2017 (Jones ¶2), and she does not dispute that her practice was to use her Hotmail account for such communications. While she states “to my

knowledge, I did not exchange any written correspondence with Dr. Hofeller” since 2017, Defendants do not represent that Jones or anyone else actually checked her email to confirm this was accurate or for materials responsive to discovery requests. Moreover, while Jones asserts that she does not recall communicating with Hofeller about the citizenship question “[s]ince January 2017,” she says nothing about communications with Hofeller during the Presidential transition, when Hofeller was speaking with transition officials about this very issue.

There are equally troubling inconsistencies between Uthmeier’s declaration and the record. For example, he states that he has “no recollection of speaking to anyone at the White House concerning the citizenship question until . . . after December 12.” Uthmeier ¶13. That is not what he told congressional investigators.² Like Davidson, Uthmeier appears to have engaged in a concerted effort to avoid a paper trail, failing to document his communications with John Baker, Gore, or Neuman. Uthmeier ¶¶5, 7-8, 12. Uthmeier does not deny using his personal email account to conduct official business; Defendants now acknowledge they misstated this in their brief. ECF 651. While Uthmeier attests as to his compliance with Commerce Department policies regarding use of personal emails, (i) there are no documents in the Administrative Record reflecting this compliance (i.e., no evidence he forwarded his personal emails to his official government email address), and (ii) neither Defendants nor Uthmeier have represented that anyone actually searched his personal email for responsive documents.

Finally, there is a disconnect between Uthmeier’s statement that he started working on the question in “spring of 2017” and that “for several months thereafter” he “received hundreds of pages of materials,” all of which have purportedly been included in the Administrative Record

² In response to a question what he did after providing his memo to Comstock and his early September emails, Uthmeier stated “I consulted John Gore at the Department of Justice. . . And I would have provided updates to individuals at the White House.” ECF 635-2 Ex. 14 at 90. There is no suggestion in this testimony that he was referring to events that occurred after the DOJ Request.

(Uthmeier ¶4), and the actual Administrative Record, which contains virtually *nothing* from this period. Defendants’ support their argument that the Administrative Record must have been complete by citing a sole email from Uthmeier from April 20, 2017. Opp. 11. This solitary email is hardly consistent with Uthmeier’s assertion that he received hundreds of pages of materials. Moreover, a log of materials (Ex. 3) involving the “several months” Uthmeier references (i.e., the four month period prior to Uthmeier sending his memo to Comstock on August 11) reflect he was involved in eighteen documents in the Administrative Record and four produced in discovery—hardly the “hundreds of pages of materials” referenced in his declaration. *See* Ex. 3. Uthmeier nowhere explains what happened to these materials.

3. Defendants Fail to Provide Sufficient Assurance Regarding their Interrogatory Response

Defendants have provided no reasonable assurance that their response to Interrogatory No. 1 is complete and accurate. Neither the declarations of Comstock (who verified the original answers) nor Uthmeier confirm the completeness of the answer. Regarding the omissions Plaintiffs identified, Uthmeier’s assertion that his White House contacts were exclusively after the Request letter is not what he told congressional investigators. And he has not specified with whom (beyond John Zadrozny) he discussed the citizenship question that would allow verification of the interrogatory response’s accuracy.

As to knowledge within DOJ, Plaintiffs previously raised completeness in the context of Comstock’s testimony that the June 21 supplemental memo was drafted by DOJ; Defendants did represent to the Court on October 24 that the interrogatory response encompasses “all facts known” to DOJ. What Defendants neglect to mention is that the day before making this representation, DOJ dumped over 90,000 pages and three additional privilege logs on Plaintiffs. It was only after these materials could be reviewed that it was apparent that almost a dozen

individuals at the highest levels of DOJ provided input on the supplemental memo. *See* ECF 635-5, Exs. 48 & 49. DOJ made no representation on October 24 that they had interviewed any of these people, and their brief still provides no such assurance.

Finally, Defendants acknowledge their failure to disclose Baker, Neuman, and Hofeller, but claim they were under no obligation to make such disclosure because they were not government officials. Opp. 20 n.9. But that ignores the fact that, in their interrogatory, Defendants made a specific representation that for the “sake of completeness,” they were identifying a non-government official, Kris Kobach. ECF 635-4, Ex. 39 at 2-3. A party who voluntarily discloses information “assumes a duty to speak fully and truthfully on those subjects.” *See, e.g., Helwig v. Vencor, Inc.*, 251 F.3d 540, 561 (6th Cir. 2001).

II. DEFENDANTS ARE INCORRECT ON KEY LEGAL ISSUES

Defendants’ response is a case study in using deliberative process privilege as both a shield and a sword. Insisting they were not engaged in a fraud and denying Hofeller’s role and minimizing Neuman’s, Defendants bookend their response with five declarations that purport to detail the drafting process and Neuman’s and Hofeller’s lack of involvement, all while shielding the actual drafting documents under deliberative process and work product privilege.

Defendants cannot have it both ways—they cannot use self-selected, self-serving evidence about their process to escape sanctions while they deny Plaintiffs access to the record about that same process. For this reason and under the balancing test (which Defendants do not address), the Court should find that the deliberative and work product privileges are waived as to the documents identified in ECF 635-5, Exs. 42-49.

Defendants’ response on the fraud exception misstates the case law: there is no requirement to prove the exception on a document-by-document basis. Rather, *In re Richard*

Roe, Inc., 168 F.3d 69, 71 (2d Cir. 1999) merely recognized that the party invoking the exception must demonstrate that “there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof.” Plaintiffs meet that standard because Defendants attempted to perpetrate a fraud on the public and the Court through their use of the false VRA rationale and subsequent cover up of the true rationale in litigation.³ Defendants do not dispute that the small number of documents at issue were in furtherance of fraudulent conduct and fraud on the Court. Plaintiffs are not required to show anything more for the fraud exception to apply.

Finally, Defendants are wrong on the relief sought. First, Plaintiffs’ request for findings as to the persons responsible and the extent of misconduct does not amount to an “advisory” opinion. There is nothing at all “advisory” about a conclusion backed up with factual findings that a party perpetrated a fraud on the Court. Second, waiver of privilege as to a limited set of documents is appropriate where, as here, Defendants’ misconduct was not limited to creating and promulgating a false explanation for adding a citizenship question but also litigation misconduct (including misrepresentations to the Court) to conceal that truth. Defendants’ efforts to distinguish authority finding privilege waiver as a sanction are unavailing. Finally, since the motion was filed, the parties have settled Plaintiffs’ claim for attorneys’ fees, and any further work the Court authorizes will be done *pro bono*. That said, Defendants are wrong that they cannot be assessed attorneys’ fees as a sanction. *See, e.g., FDIC v. Maxxam, Inc.*, 523 F.3d 566, 595-97 (5th Cir. 2008); *Adamson v. Bowen*, 855 F.2d 668, 671 (10th Cir. 1988).

³ Contrary to Defendants’ argument, nothing in *Conservation Force v. Jewell*, 66 F. Supp. 3d 46 (D.D.C. 2014) suggests that an agency can maintain a privilege with respect to documents used to proffer a false, pretextual justification for a decision that the agency then perpetrates a fraud on the court in its defense of the decision.

Dated: August 9, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2018, the foregoing NYIC PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR SANCTIONS was served on all counsel of record via ECF and on Mark Neuman through his counsel in this matter via email and overnight mail at the following address:

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Exhibit 1: Comparison of Defendants' Declarations

Topic	Uthmeier	Davidson	Comstock	Jones	Gore
Personal compliance with completeness of Administrative Record	"I took with utmost seriousness my duties and obligations to respond to all requests for discovery in this matter, and to furnish documents and information required for inclusion <u>in the administrative record</u> , as required by law." ¶ 14.	"I took with utmost seriousness my duties and obligations to comply with all requests for discovery in this matter to the full extent required by law." ¶ 11.	No language	No language	"I took with utmost seriousness my duties and obligations to comply with all requests for discovery in this matter to the full extent required by law, and as a witness in these proceedings to provide complete and accurate testimony." ¶ 18.
Role in ensuring agency compliance to complete Administrative Record	"I took equally seriously my obligation to ensure that my client responded as required to all discovery requests, and included the information required in the administrative record."¶ 14.	No language.	No language	No language	No language.
Direction and awareness of Other's compliance to provide a complete Administrative Record	"At no time did I withhold, direct anyone to withhold, or become aware that anyone had withheld documents or information required in discovery, <u>or for purposes of the administrative record</u> , except for documents and information withheld on grounds of privilege that were accounted for in Defendant's privilege logs." ¶ 14	"At no time did I withhold, direct anyone to withhold, or become aware that anyone had withheld documents or information required to be produced in discovery, except for documents and information withheld on grounds of privilege that were accounted for in Defendants' privilege logs." ¶ 11.	No language	No language	"At no time, including during my deposition, did I withhold, direct anyone to withhold, or become aware that anyone had withheld documents or information required to be produced in discovery, except for documents and information withheld on grounds of privilege that were accounted for in Defendants' privilege logs or Defendants' counsel's objections and instructions not to answer during deposition." ¶ 18.

Role and knowledge of Neuman letter	<p>“I never received, reviewed, or provided any comments or feedback on any draft, advance copy, or other document purportedly to be sent from the Department of Justice to the Census Bureau . . . This includes any document purportedly drafted or handled by Mr. Mark Neuman.” ¶ 6. “I am unaware of others in the Commerce Department receiving, reviewing or otherwise commenting on . . . any other draft letter prepared or handled by Mr. Neuman.” ¶ 8.</p>	<p>“I did not draft, provide comments on, or discuss the Neuman Letter with anyone, including Mr. Neuman. <u>I have no personal knowledge regarding who authored, reviewed, commented on, or contributed to the Neuman Letter.</u> Nor have I ever seen any drafts of the Neuman Letter or documents resembling the Neuman Letter.” ¶ 6.</p>	<p>“I had never seen a copy of a purported draft letter from the Department of Justice to the Census Bureau requesting a citizenship question (“the Neuman Letter”), nor did I ever comment on any drafts of the Neuman letter. To the best of my knowledge, none of my staff worked on or provided comments on the Neuman letter.” ¶ 3.</p>	<p>“I had never seen a copy of a purported draft letter from the Department of Justice to the Census Bureau requesting a citizenship question (“the Neuman Letter”). ¶ 4.</p>	<p><u>“I have no personal knowledge regarding who authored, reviewed, commented on, or contributed to the Neuman Letter.”</u> ¶ 10.</p>
Awareness of Neuman letter	No language.	<p><u>“I was unaware that A. Mark Neuman . . . had in his possession a draft letter concerning a citizenship question on the census questionnaire. . . I never discussed a draft letter with Mr. Neuman.”</u> ¶ 5.</p>	No language.	No language.	<p>“I received from Mark Neuman a draft letter concerning a citizenship question on the census questionnaire (“the Neuman Letter”), when I met with Mr. Neuman around October 2017.” ¶ 6.</p>

Role of Commerce in DOJ Request Letter	<p>“I never received, reviewed, or provided any comments or feedback on any draft, advance copy, or other document purportedly to be sent from the Department of Justice to the Census Bureau. . .” ¶ 6.</p> <p>“I did not provide any comments or feedback on [the DOJ letter.]” ¶ 7.</p> <p>“I am unaware of others in the Commerce Department receiving, reviewing or otherwise commenting on drafts of the December 12, 2017 DOJ Letter. . .” ¶ 8.</p>	<p>“We discussed the drafting and the timing of a letter from the Department of Justice about the citizenship question. We also discussed the possible content of such a letter in general terms.” ¶ 7.</p>	<p>“I never saw any drafts of the Department of Justice’s December 12, 2017 letter . . . nor did I have any discussions with anyone at DOJ about the Gary Letter.” ¶ 4.</p>	No language.	<p>“During the time that I was drafting the Gary Letter, I had discussions with Peter Davidson and James Uthmeier . . . about the citizenship question. I discussed with Mr. Davidson and Mr. Uthmeier the drafting and the timing of a letter from the Department of Justice to request reinstatement of a citizenship question on the census questionnaire. I also discussed with Mr. Davidson and Mr. Uthmeier the possible content of such a letter in general terms.” ¶ 11.</p>
Familiarity with Hofeller	<p>“I was unaware of the late Dr. Thomas Hofeller . . . I have never met, spoken to, or otherwise communicated with Dr. Hofeller.” ¶¶ 10-11.</p>	<p>“I have never met, communicated with, or spoken to Dr. Hofeller.” ¶ 2.</p>	<p>““I had never heard of Dr. Hofeller . . .” ¶ 2.</p>	<p>“I was personally acquainted with Dr. Thomas Hofeller, whom I have known for many years.” ¶ 2.</p>	<p>“I have never met, communicated with, or spoken to Dr. Thomas Hofeller.” ¶3</p>
Awareness of Hofeller’s VRA Rationale	<p>“I was also unaware of a one-paragraph document purportedly recovered from his files after his death that discusses compliance with the Voting Rights Act as a justification for including a citizenship question on the census.” ¶ 10.</p>	<p>“I was similarly unaware of . . . the 2017 draft paragraph that discusses the Voting Rights Act.” ¶ 4.</p>	<p>“I was similarly unaware of . . . the 2017 draft paragraph that discusses the Voting Rights Act.” ¶ 2.</p>	<p>“I had never seen . . . the one-paragraph document, allegedly created in 2017, that allegedly was retrieved from Dr. Hofeller’s computer and whose text appears in the Neuman Letter.” ¶ 4.</p>	No language.

Exhibit 2: Status of Defendants' Responses to Questions Posed on July 16, 2019

Discovery Questions Posed by Plaintiffs (Motion for Sanctions at 25-27)	Defendants' Response	Additional Questions
1. Did anyone at Commerce (including Neuman or Jones) have Dr. Hofeller's 2015 study?	Partial response. Jones denies having the study (Jones ¶ 3), as do other Commerce declarants, but Defendants do not address whether their "trusted advisor" Neuman had the study.	
2. Did anyone at Commerce (including Neuman or Jones) appreciate that adding a citizenship question would enable redistricting advantageous to "Republicans and Non-Hispanic Whites"?	No response.	
3. Even if they did not have a copy of Dr. Hofeller's 2015 study, did anyone at Commerce (including Neuman or Jones) appreciate that adding a citizenship question would enable redistricting advantageous to "Republicans and Non-Hispanic Whites"?	No response.	
4. What did Uthmeier mean when he wrote to Earl Comstock in forwarding his August 11 memo that "our hook" was "[u]ltimately, we do not make decisions on how the [citizenship] data will be used for apportionment, that is for Congress (or possibly the President) to decide"? Ex. 40.	No response.	

5. What information did Jones receive from Hofeller relevant to redistricting or the citizenship question and what did she share with individuals at Commerce?	Partial response. Jones says she does not recall discussing the citizenship question with Hofeller after January 2017. Jones ¶ 2. She does not address whether she discussed redistricting or apportionment, what her discussions were with Hofeller prior to 2017, or what she shared with others at Commerce.	<ul style="list-style-type: none"> • Did Jones have communications with Hofeller or Neuman about redistricting, apportionment, or the VRA rationale? • What were Jones' communications with Hofeller about the citizenship question prior to 2017? • Did she communicate with anyone at Commerce about any of these topics?
6. Did any of the information she had (including that received prior to the start of the Administration) play any role in her contributions to Secretary Ross's March 26 decisional memo?	No response.	
7. Did anyone at DOJ appreciate that adding a citizenship question would enable redistricting advantageous to "Republicans and Non-Hispanic Whites"?	No response.	
8. What was the substance of Gore's discussion of "apportionment" with Davidson and Uthmeier?	No response.	
9. What did Gore discuss with the White House?	No response.	
10. Did others at DOJ discuss these matters with the White House, with Neuman, or with Dr. Hofeller?	No response.	

11. Who asked Dr. Hofeller to ghostwrite the VRA rationale that appears in the draft DOJ letter that Neuman gave Gore? Someone must have asked Dr. Hofeller to draft it.	No response.	
12. How did Dr. Hofeller's ghostwritten VRA rationale reach Neuman?	No response.	
13. Did Commerce officials in their editing of the draft DOJ letter relay the VRA rationale?	Partial response. Comstock, Davidson, and Uthmeier deny direct contacts with Hofeller. Davidson (but not the others) says he was unaware of the Neuman letter (Davidson ¶ 5), and Comstock (but not the others) says he had no communications with Gore or "anyone at DOJ" about the letter. Comstock ¶ 4. None of them deny being aware that the VRA rationale was being provided to DOJ.	<ul style="list-style-type: none"> • Did anyone else at Commerce have contacts, directly or indirectly, with Hofeller? • Was anyone at Commerce (including Comstock and Uthmeier) aware of Neuman's letter? • Did anyone at Commerce (including Uthmeier or Davidson) convey the VRA rationale to DOJ?
14. Did Hofeller give the VRA rationale to Neuman directly?	No response.	
15. Why didn't Gore identify Neuman, Davidson, or Uthmeier at deposition when he provided a list of other people who provided input in drafting the DOJ letter?	Partial response. Gore testified at his deposition that other than Herren, Pickett, Gary, and Aguinaga, Gore did not recall anyone else from whom he received input on the draft of the DOJ letter to Commerce. (Defs' Ex. 5 150:21-151:20). Gore claims he did not "rely upon the Neuman letter or any other information provided to me by Mr. Neuman, in drafting the Gary Letter," Gore ¶ 9. Gore also claims he "did not rely upon anything	<ul style="list-style-type: none"> • If Gore did not get the VRA rationale from Neuman or Commerce officials, where did he get it from? • Why did Gore tell congressional investigators he received input from Davidson and Uthmeier on the letter? <i>See</i> ECF 635-2, Ex. 13 at 21, 139-40, 166-69 ("Q: Did [Davidson and Uthmeier] give you any comments, feedback, advice about the drafting of that letter? Mr. Gardner. You can

	communicated by Mr. Davidson, Mr. Uthmeier, or anyone else at the Department of Commerce in drafting the Gary Letter.” ¶ 11. This conflicts with what Gore told congressional investigators and Davidson’s account. Davidson ¶ 7 (“We discussed the drafting and the timing of a letter... We also discussed the possible contents of such a letter in general terms”).	<p>answer that with a yes or no. A: Yes. Q: Just to be clear, does that yes pertain to both Peter Davidson and James Uthmeier or one or the other? A: Both.”).</p> <ul style="list-style-type: none"> • Why does Gore state in his declaration that he discussed the content of the Request letter with Uthmeier “in general terms” (Gore ¶ 11), when Uthmeier denies such a role? Uthmeier ¶¶ 6-7.
16. Where are the other “versions” of the draft DOJ letter that Neuman testified he worked on with Davidson, Uthmeier, and Comstock?	Partial response. Davidson, Uthmeier, and Comstock’s Declarations all state they did not receive any drafts of the DOJ letter, including Neuman’s draft. Davidson further avers he was not aware that Neuman had a draft letter (Davidson ¶ 5), but Uthmeier and Comstock do not make similar representations. The declarations from the Commerce General Counsel’s office and information technology specialists confirm they performed supplemental searches on Davidson, Uthmeier, and Comstock’s government email accounts, but do not address whether they searched physical files or personal emails. Cannon II ¶¶ 2-4, McKenzie ¶¶ 3-4, Ware ¶¶ 5-7.	<ul style="list-style-type: none"> • Why would Neuman lie about working on “versions” of the letter? • If Neuman got this wrong, why haven’t Defendants provided a declaration from their “trusted advisor” correcting his testimony? • Why would Neuman specifically identify Davidson, Comstock, and “people that work for Earl” as individuals who “were reviewing and offering thoughts on draft versions”? ECF 635-2 Ex. 12 at 283-284. • Why would Neuman testify he provided his comments on the draft letter to Uthmeier? <i>Id.</i> at 284. • Why didn’t Uthmeier correct this testimony at Neuman’s deposition if it was false? • Why did Defendants limit their supplemental searches to government email accounts and not search personal emails or physical files?

<p>17. Why weren't these included in the Administrative Record or identified on a privilege log?</p>	<p>No response.</p>	<ul style="list-style-type: none"> • Did Comstock, Uthmeier, Davidson, or anyone else at Commerce get rid of the versions of the letter? • Why did Comstock initiate a discussion with Secretary Ross about curating the Administrative Record? • How did Comstock and others at Commerce interpret Secretary Ross' directive to be "very careful, about everything" (AR 12476), and did that directive have anything to do with the dearth of Administrative Record materials prior to the DOJ request?
<p>18. Why didn't DOJ disclose on its privilege log that the draft DOJ letter came from Neuman?</p>	<p>Partial response. Gore states "at the time I produced these documents to counsel for the Defendants, I did not recall exactly where I had received the Neuman Letter" and "after Mr. Neuman produced the Neuman Letter ... I realized that the document in my possession must have come from Neuman." Gore ¶ 17.</p>	<ul style="list-style-type: none"> • If Gore did not recall where the letter came from, what was Defendants' basis for telling the Court on June 3, 2019 that it was obvious that the letter came from Neuman such that "Plaintiffs have known since at least October 23, 2018 that Gore had the Neuman letter"? ECF 601 at 3. • If Gore did not know where the letter came from, what was Defendants' basis for asserting privilege to withhold the document? • Neuman produced his version of the letter on October 25, 2018, two days after DOJ represented that they did not know the Neuman letter's provenance. When (and under what circumstances) did Gore review the Neuman production, and why didn't he correct the record then?

<p>19. Why didn't Defendants correct Neuman's materially false testimony that his October 2017 meeting with Gore was <i>not</i> about a draft DOJ letter requesting a citizenship question on the 2020 Census, that Neuman gave Gore only a <i>different</i> document at that meeting, and that Neuman was not involved in the drafting process for the DOJ letter at all?</p>	<p>Partial response. Gore avers that "the Neuman letter was not a draft of the Gary Letter," Gore ¶ 7, but does not deny their meeting was about the DOJ letter. Neither Defendants nor Uthmeier address why Uthmeier did not correct this or the other misstatements at Neuman's deposition.</p>	<ul style="list-style-type: none"> • Why did Gore tell congressional investigators that the document he received from Neuman was a "draft letter that would request reinstatement of the citizenship question . . ."? ECF 635-2, Ex. 13, Tr. 26. • Why didn't other defense counsel correct Neuman's misstatements at his deposition?
<p>20. Was Uthmeier aware that Neuman gave Gore the draft DOJ letter, and if so, why didn't he correct Neuman's testimony?</p>	<p>No response. Uthmeier states only that he did not see or receive any drafts of the Neuman letter. He does not deny that he had contemporaneous knowledge of the Neuman letter's existence. Uthmeier ¶ 6.</p>	
<p>21. Who were the White House officials that Uthmeier testified he consulted with about the citizenship question?</p>	<p>Partial response. In their brief, Defendants cite documents from the Administrative Record and discovery production and state that beyond John Zadrozny, "Uthmeier likely had communications with other members of the White House staff" including James Sherk, Theo Wold, and George Doty. Defendants do not confirm this is a comprehensive list. Uthmeier does not address whom he consulted in his declaration.</p>	<ul style="list-style-type: none"> • Who were the other members of the White House staff who discussed the matter with Uthmeier? • Beyond Uthmeier, what other contacts did senior Commerce officials have with the White House about the citizenship question, and why weren't these communications reflected on any logs? • What was the timing and content of such communications, and why would they not have been responsive to Plaintiffs' Interrogatory No. 1?

22. Why didn't Defendants disclose the role of these White House officials, Neuman, Hofeller, or John Baker in their interrogatory responses?	Partial response. Defendants state that they were not included because they were not "government officials." None of the declarants (including Comstock who verified the initial responses) confirms that the interrogatory response is comprehensive.	If the Defendants disclosed another non-governmental official (Kris Kobach) "for the sake of completeness," why did they omit other non-governmental individuals?
23. Was the identity of these individuals known to Mr. Comstock when he certified the interrogatory response?	No response.	Were Commerce officials aware of anyone else, inside or outside the Administration, who "previously raised" the citizenship question? If so, why are none of these communications reflected in the Administrative Record?
24. Were they known to any of the DOJ officials who consulted on Secretary Ross's June 21 memo?	No response.	Have each of the DOJ senior officials involved in drafting the June 21, 2018 supplemental memorandum (ECF 635-5, Exs. 48-49) been interviewed about the identity of anyone else who "previously raised" the citizenship question? If not, why not?
25. Do Defendants now assert that Gore's motivation and guide for requesting a citizenship question was the <i>Evenwel</i> case about potential use of citizenship data in redistricting, as opposed to VRA enforcement?	No response.	
26. Do they assert that Gore relied on <i>Evenwel</i> amicus briefs which concluded that ACS data was sufficient for VRA enforcement and that adding a citizenship question to the Census would depress turnout and reduce accuracy?	No response.	

Exhibit 3: Log of Administrative Record Documents James Uthmeier Authored or Received Prior to August 11, 2017

DATE	Begin Bates	Production	AUTHOR	RECIPIENT	SUBJECT	Privilege Issues
6/23/2017	AR 11319	Administrative Record	Keller, Catherine B (United States of America Dept of Commerce)	Uthmeier, James	2020 Census	
6/27/2017	AR 3705	Administrative Record	Uthmeier, James	Comstock, Earl	Accepted Hold Meet with James Re Census and Citizenship	
6/27/2017	AR 11355	Administrative Record	Uthmeier, James	Shambon, Leonard	Census	
6/27/2017	AR 12824	Administrative Record	Uthmeier, James (Federal)	Shambon, Leonard (Federal)	Census	
7/11/2017	AR 11317	Administrative Record	Schnell, Austin	Uthmeier, James	Hearing Prep Census	
7/11/2017	AR 11318	Administrative Record	Schnell, Austin (Federal)		(Attachment to AR 11317) Hearing Prep - Census.docx	Withheld in Full; Draft Qs&As on citizenship question for hearing prep
7/11/2017	AR 11336	Administrative Record	Uthmeier, James (Federal)	Schnell, Austin	Hearing Prep Census	
7/11/2017	AR 11339	Administrative Record	Schnell, Austin	Uthmeier, James	Hearing Prep Census	
7/11/2017	AR 11340	Administrative Record	Schnell, Austin (Federal)		(Attachment to AR 11339) Hearing Prep - Census.docx	Withheld in Full; Draft Qs&As for hearing prep, prepared by counsel
7/11/2017	AR 11354	Administrative Record	Uthmeier, James	Schnell, Austin	Hearing Prep Census	
7/11/2017	AR 11366	Administrative Record	Schnell, Austin	Uthmeier, James	Hearing Prep Census	
7/11/2017	AR 11367	Administrative Record	Schnell, Austin (Federal)		(Attachment to AR 11366)Hearing Prep - Census.docx	Withheld in Full; Draft Qs&As for hearing prep
7/11/2017	AR 11368	Administrative Record	Schnell, Austin	Uthmeier, James	Hearing Prep Census	

DATE	Begin Bates	Production	AUTHOR	RECIPIENT	SUBJECT	Privilege Issues
7/11/2017	AR 11369	Administrative Record	Schnell, Austin (Federal)		(Attachment to AR 11368) Hearing Prep - Census.docx	Withheld in Full; Draft Qs&As for hearing prep, prepared by counsel
7/13/2017	AR 11364	Administrative Record	Schnell, Austin	Uthmeier, James	Census Responses	
7/11/2017	AR 11365	Administrative Record	Schnell, Austin (Federal)		(Attachment to AR 11364) Hearing Prep - Census.docx	Withheld in Full; Draft Qs&As for hearing prep
8/7/2017	AR 11353	Administrative Record	Uthmeier, James	Shambon, Leonard	Census	
8/7/2017	AR 12823	Administrative Record	Uthmeier, James (Federal)	Shambon, Leonard (Federal)	Census	

** In addition to these Administrative Record documents, Defendants produced four documents in discovery that Mr. Uthmeier authored, received, or was the custodian for dated prior to August 11, 2017: COMDIS00016544, COMDIS00016538, COMDIS00017170, and COMDIS00017421.